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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-470

PHYLLIS B. HETRICK,

Petitioner,

—v.—

ROBERT R. MARTIN, President of Eastern Kentucky University, and the BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 15, 1973.

Citation to Opinion Below

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix, *infra,* p. 1a. The Findings of Fact and Conclusions of Law, Memorandum Opinion, and opinion denying defendants' motion to dismiss of the District Court are set out in the Appendix, *infra,* pp. 11a, 17a and 21a respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(1).

Constitutional Provisions Involved

United States Constitution, Amendment I

"Congress shall pass no law . . . abridging freedom of speech . . . "

United States Constitution, Amendment XIV

" . . . nor shall any State deprive any person of life, liberty or property, without due process of law . . . "

Question Presented

Whether a public university may, consistent with the First and Fourteenth Amendments, refuse to renew the contract of a non-tenured faculty member on the ground that the faculty member's teaching methods and educational philosophy do not conform with those approved by the governing officials of the University?

Statement of the Case

The petitioner, Dr. Phyllis B. Hetrick, filed suit in the United States District Court for the Eastern District of Kentucky on August 12, 1970, against the President and Board of Regents of Eastern Kentucky University, charging that the failure of the University officials to renew her appointment for the 1970-71 academic year was violative of her constitutional rights. In particular, she asserted that her First and Fourteenth Amendment rights had been violated by her termination without a hearing or written statement of reasons, on an arbitrary basis, for making in-class statements about the war and the draft and because

of her beliefs and ideas. The District Court rejected the claim that she was entitled to a hearing or written statement of reasons, and the trial before the Court was limited to the question whether the petitioner had been terminated for conduct on her part that was protected by the First Amendment. The District Court held that the termination of the petitioner's employment was not violative of her First Amendment rights, and its judgment was affirmed by the Court of Appeals.

The petitioner was appointed as a non-tenured Assistant Professor of English at Eastern Kentucky University for the 1969-70 academic year. The appointment was for a one year term and could be renewed thereafter. In the fall of 1969 the petitioner had occasion to discuss the Vietnam War and the draft in her English Composition classes. She also made a statement to the class that, "I am an unwed mother." (The petitioner was divorced and had two children.) A parent complained about these statements to Dr. Robert R. Martin, the President of the University, and Dr. Martin ordered an investigation. The investigation was initially conducted by Dr. Kelly Thurman, the Chairman of the Department of English, and was subsequently joined in by Dr. Frederick Ogden, the Dean of the College of Arts and Sciences. There was a conference between the petitioner and Dr. Thurman and a further conference between the petitioner, Dr. Thurman and Dr. Ogden. Dr. Ogden then made a written report to President Martin, which concluded with the statement, "Dr. Thurman and I have advised Miss Hetrick to be aware of the somewhat restrictive backgrounds of her freshman students and to confine her discussions more closely to the specific essays and other material assigned in the English Composition course." President Martin was not satisfied with this report, saying

that Dean Ogden had overlooked the "unwed mother" remark. Dr. Thurman then sent a letter to President Martin explaining the "unwed mother" remark as illustrating the "importance of the rich connotations that words have and of the necessity of singling out the novel meanings in order to give one's writing a particular flavor." President Martin still was not satisfied and sought a further explanation from Dean Ogden, who in turn informed President Martin that, "Dr. Thurman had cautioned her about making such statements to the generally unsophisticated students which we have."

In February, 1970, the petitioner was informed that her contract would not be renewed for the 1970-71 academic year. She was the only one of 11 new persons who had been added to the English Department during 1969-70 who was not offered a contract for the 1970-71 academic year, and the only one of approximately 40 new persons on probationary appointments in the College of Arts and Sciences for that year who was terminated by non-renewal. In the 1967-8 academic year 14 new persons were added to the English Department, none of whom was terminated by non-renewal, and in the 1968-9 academic year 10 persons were added to the Department, none of whom was terminated by non-renewal after the first year, although one was terminated after the second year.

The petitioner contended that her discussion about Vietnam and the draft in her English Composition class and her "unwed mother" remark, which resulted in the investigation described above, were the principal reasons why her contract was not renewed. Dr. Thurman and other University officials put forth other reasons for the non-renewal of the petitioner's contract. The District Court found that the reasons advanced by Dr. Thurman and the University

officials were "largely superficial" and that the alleged inadequacies on the part of the petitioner were "easily correctable."[1] But it also found that the petitioner had not sustained her burden of proving that the decision not to renew her contract was predicated upon her classroom discussion of the war and the draft and the "unwed mother" remark. Instead, as the Court stated:

> "The court finds from the tenor of the evidence that the non-renewal of Dr. Hetrick's contract was not based so much on those specific reasons [those advanced by Dr. Thurman and the other University officials], as it was on the feeling of Dr. Thurmond [sic] and the other faculty members of the English Department that Dr. Hetrick's teaching philosophy and the manner in which she implemented it were not adaptable to the achievement of the academic goals of the University. . . . (App., *infra*, p. 14a.)
>
> "It simply seems that Dr. Hetrick's teaching methods were too progressive or perhaps less orthodox than the other faculty members in her department felt were conducive to the achievement of the academic goals they espoused." (App., *infra*, p. 19a.)

The District Court concluded that the refusal to renew the petitioner's contract on this ground was constitutionally

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[1] For example, one of the purported reasons was that the petitioner had not yet obtained her Ph.D. degree, although she had said she would do so by the end of the first semester. However, on January 22, 1970, Dr. Thurman wrote to Dean Ogden that the petitioner expected to receive the degree in June, 1970, which she in fact did. More significantly, five other new members who had been added to the English Department during the 1969-70 academic year not only had not received their degrees by the end of that year, but had not received them by the time of the trial of the case in January, 1972, and were still on the faculty.

permissible, and the Court of Appeals agreed with this conclusion.

REASONS FOR GRANTING THE WRIT

I.

The question whether a public university may, consistent with the First and Fourteenth Amendments, refuse to renew the contract of a non-tenured faculty member on the ground that the faculty member's teaching methods and educational philosophy do not conform with those approved by the governing officials of the University is clearly an important constitutional question which has not been but should be settled by this Court.

Although this Court has dealt with numerous cases involving the academic freedom of teachers and students, it has never been, in the words of the Court of Appeals, "squarely presented with the question whether the administration of a public school may, consistent with the First Amendment, fail to renew a nontenured teacher because of displeasure with her 'pedagogical attitudes.'" (App., *infra*, p. 7a.) The cases involving claims of violation of adademic freedom have related essentially to out-of-class matters such as the requirement that a teacher submit to a loyalty oath, e.g., *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), or give testimony before a legislative investigating committee, e.g., *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), or to a teacher's dismissal for commenting on matters of public concern, *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), or exercising other constitutional rights. *Slochower* v. *Board of Education*, 351 U.S. 551 (1956). Academic freedom in the classroom itself has come

before this Court only in the context of challenges to state laws that have prohibited the teaching of particular subjects or ideas, as in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). Although it is indisputable that a non-tenured teacher's contract cannot be refused renewal on grounds that are violative of the teacher's First Amendment rights, *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the precise nature of those rights as they relate to teaching in the classroom have not been defined by this Court in any case. As a result, as suggested by the Court of Appeals, it may indeed be that the meaning of academic freedom is "amorphous."

It is the teaching in the classroom, however, that goes to the essence of academic freedom. As this Court stated in *Keyishian* v. *Board of Regents*, 385 U.S. at 603:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"

In *Sweezy* v. *New Hampshire*, 354 U.S. at 250, the Court noted that, "To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of the Nation," and in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 511

(1968), it emphasized that, "In our system students may not be regarded as the closed circuit recipients of only that which the state chooses to communicate."

The invalidation of overbroad loyalty oaths and legislative inquiries because of their possible chilling effect on academic freedom, as in *Keyishian, Sweezy* and similar cases, is likewise related to the crucial importance of free classroom inquiry, and it is paradoxical to say, as did the Court of Appeals, that the state may not inhibit academic freedom by these means, but that it may do so by acting on classroom teaching itself and refuse to renew a teacher's contract because her teaching methods are "too progressive" or "insufficiently orthodox." If the courts "have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief," *Epperson* v. *Arkansas,* 393 U.S. at 104, that mandate must extend to classroom teaching itself, and this teaching cannot be placed in a "straitjacket" by the threat of non-renewal due to "displeasure with pedagogical attitudes."

As the Court of Appeals noted, the lower court cases dealing with in-class academic freedom have generally involved dismissal of teachers because of certain statements or assignments that the school officials found objectionable. It should also be pointed out that the plaintiffs in most of these cases were secondary and elementary school teachers. In the case at bar the question is squarely presented whether on the university level the academic freedom of a teacher includes the freedom to espouse a teaching philosophy or to employ teaching methods that differ from those approved by the governing University

officials. This question goes to the essence of in-class academic freedom and is a substantial and important question requiring resolution by this Court.

II.

In the case at bar the question of the meaning of in-class academic freedom is presented most clearly, and this is an appropriate case for the Court to grant certiorari to resolve that question.

In the case at bar the issue of the meaning of in-class academic freedom is presented very strikingly. As the Court of Appeals stated with respect to the District Court's conclusion that the refusal to renew the petitioner's contract was based on disagreement with the petitioner's educational philosophy and teaching methods:

> "The evidence to which the court referred consisted in part of plaintiff's testimony and that of her students, and the testimony of the defendants concerning what was expected of teachers at Eastern Kentucky. The school administration considered the students as generally unsophisticated and as having 'somewhat restrictive backgrounds,' and for this reason apparently expected the teachers to teach on a basic level, to stress fundamentals and to follow conventional teaching patterns—in a word, to 'go by the book.' Plaintiff's evidence, on the other hand, tended to show that her teaching emphasized student responsibility and freedom to organize class time and out-of-class assignments in terms of student interest, all in an effort, she claims, to teach them how to think rather than merely to accept and to parrot what they had heard." App., *infra,* pp. 3a-4a.

The question is whether the First Amendment's guarantee of academic freedom protects the right of a University teacher to try to teach students to think for themselves rather than always to "go by the book." It must be emphasized again that what is involved here is the meaning of academic freedom at the university level, not at a secondary or elementary school, where perhaps some restraints might be justified because of the relative youth of the students and the difference in function between these schools and universities. See the discussion in *Mailloux* v. *Kiley*, 323 F. Supp. 1387, 1392 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971). The case, moreover, does not involve a refusal to obey specific directives, even if the issuance of such directives were permissible on the university level, or to follow a prescribed curriculum. Cf. *Ahern* v. *Board of Education of the School District of Grand Island*, 456 F.2d 399 (8th Cir. 1972); *Clark* v. *Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 2148 (1973). Nor does it involve the use of highly unconventional or "shock effect" tactics. It involves the right to pursue different teaching methods and to hold a different educational philosophy, and challenges the power of university officials to "cast a pall of orthodoxy over the classroom," *Keyishian* v. *Board of Regents, supra*, by terminating the contracts of teachers who do not agree with their views.

The First Amendment's guarantee of academic freedom to teachers is a representational right, and in particular is for the benefit of the students who must be "trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian* v. *Board of Regents, supra.* In the case at bar the petitioner's employment was terminated because of

disagreement with her educational philosophy and teaching methods, and this, it is submitted, deprived the students at Eastern Kentucky University of their right to be presented with a different kind of educational experience than that to which they had previously been subjected. As Gary Winn, a student in petitioner's English Composition course, whose parents requested the investigation into the petitioner's classroom teaching, testified:

> "She tried to get us to think for ourself and tried to, you know, everything has been put to you so much, you think this, you know, and she was just trying to get us to think for ourselves and work on our own . . . (Tr. 427).
>
> I would still consider her different, because most of them [the other teachers at Eastern Kentucky University], you know, the ones I have run into are still about the same, they follow the textbook and this kind of thing and stick to the same format, but I can look back now and appreciate what Miss Hetrick tried to do, tried to get me—and how she tried to get me to think at the time and use my mind" (Tr. 432).

If the constitutional guarantee of academic freedom means anything, it must protect the right to teach students to think, and it is that right which is involved in this case. This is a particularly appropriate case for this Court to grant review so that it may define the contours of in-class academic freedom and decide whether a teacher at a public university must, on pain of non-renewal of her contract, conform to the educational philosophy and teaching methods favored by the governing officials of the university.

III.

The Court of Appeals has completely misinterpreted the thrust of this Court's decision in *Board of Regents of State Colleges* v. *Roth*, and certiorari should be granted to correct this erroneous interpretation.

The Court of Appeals was of the view that this Court's decision in *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), effectively precluded it from holding that the First Amendment's guarantee of academic freedom protects the right of a teacher at a public university to hold a different educational philosophy and to employ different teaching methods from those favored by the governing officials of the University. It saw the decision in *Roth* as sanctioning the termination of a teacher's employment for "entirely arbitrary reasons," and stated that if a teacher's contract could not be terminated because of disagreement with her educational philosophy and teaching methods, every non-renewal decision would be "a likely candidate for a court suit." *Roth*, however, dealt only with the question whether the Fourteenth Amendment's guarantee of procedural due process entitled a teacher to notice of reasons and a hearing upon non-renewal. In the companion case of *Perry* v. *Sindermann*, 408 U.S. 593 (1972), this Court made it unmistakably clear that the First Amendment was fully applicable to the termination of a teacher's employment by non-renewal of his contract, and that it applied equally to teachers who did not have tenure and to those who had. The question in the case at bar is whether the First Amendment precludes a public university from refusing to renew a teacher's contract because of disapproval of her educational philosophy and teaching methods, and it is difficult

to see how this Court's holding as to the procedural rights of teachers whose contracts have not been renewed is relevant to the resolution of that question.

It appears that the Court of Appeals read *Roth* as signalling a "hands-off" attitude toward non-renewal of faculty appointments except where the non-renewal can be shown to have been predicated upon clearly protected out-of-class expressions or associations. At a time when university teaching posts are becoming in short supply, it is particularly important that university officials not be permitted to use the power of non-renewal of contracts to coerce intellectual conformity. Precisely because university teachers are not entitled to the procedural guarantees of notice of reasons and a hearing in the case of non-renewal, they should at least have the strong protection of the First Amendment, and where it can be shown, as here, that the non-renewal decision was designed to coerce intellectual conformity, the First Amendment should apply.

The Court of Appeals completely misinterpreted the thrust of this Court's holding in *Roth*. This Court should grant certiorari in order to correct that misinterpretation and to define the contours of First Amendment protection in the area of non-renewal of university teaching contracts.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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